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No. 02-1060

In the Supreme Court of the United States

ILLINOIS, PETITIONER,

v.

ROBERT S. LIDSTER, RESPONDENT.

On Writ of Certiorari to the Supreme Court of Illinois

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The central question here is whether the Lombard informational checkpoint is *per se* invalid under *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). When he finally arrives at that question, respondent argues in the affirmative, reasoning that the checkpoint's purpose — obtaining information to solve an unsolved hit-and-run accident — was related to law enforcement. Resp. Br. 15-18. This argument disregards this Court's caveat that *Edmond* did not adopt a "non-law enforcement primary purpose test." 531 U.S. at 44 n.1. Moreover, respondent neglects the crucial distinction between checkpoints used as a dragnet to detect hitherto unknown crimes being committed by the motorists themselves, which are governed by *Edmond*, and checkpoints used to seek information about known but unsolved crimes that had been committed by others, which are not. See Pet. Br. 8-14.

Having failed to establish that *Edmond* governs informational checkpoints, respondent next contends that the Lombard checkpoint does not satisfy the reasonable factors in *Brown v. Texas*, 443 U.S. 47 (1979). Resp. Br. 17-28. In so doing, respondent incorrectly asserts that solving a hit-and-run fatality is not a weighty public concern, distorts the character and purpose of the checkpoint, and ignores precedent in suggesting that there were alternatives available to the Lombard police. Respondent's contentions do nothing to undermine our position (Pet. Br. 14-21) that the checkpoint satisfies the *Brown* reasonableness factors.

In the end, respondent is left with no choice but to urge the overruling of *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990). Resp. Br. 6-13, 28-31. This tacitly and correctly concedes that the Lombard checkpoint passes muster under this Court's roadblock precedents, and that respondent can prevail only if this Court alters its Fourth Amendment jurisprudence.

Moreover, respondent fails to establish that *Sitz* was wrongly decided, let alone that *Sitz* presents some special justification that would warrant departing from *stare decisis*.

I. The Lombard Checkpoint Is Not Invalid Under *City of Indianapolis v. Edmond*.

Edmond teaches that, absent exigent circumstances not present here, the Fourth Amendment invalidates suspicionless roadblocks whose primary purpose is "general crime control" or "detect[ing] evidence of ordinary criminal wrongdoing." 531 U.S. at 41, 47. Our initial brief demonstrated that *Edmond*'s prohibition reaches only those roadblocks whose purpose is to detect hitherto unlawful activity by the motorists themselves, not roadblocks designed to seek information about known but unsolved crimes committed by others. Pet. Br. 8-14.

Our conclusion follows from *Edmond* itself, which held:

> We decline to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes. We cannot sanction stops justified only by the *generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime*.

531 U.S. at 44 (emphasis added). As this passage makes clear, the Court's concern extended only to roadblocks intended to reveal ongoing criminal activity by the motorists themselves. See Pet. Br. 9-11; Brief for the United States as *Amicus Curiae* 18-21 ("U.S. Br."); *Edmond*, 531 U.S. at 44 (Fourth Amendment prohibits program "under which authorities might simply stop cars as a matter of course to see if there just happens to be a felon leaving the jurisdiction"). Our conclusion also follows from the context against which *Edmond* was decided, as the Court's checkpoint cases all involved attempts

to detect whether the motorists themselves were engaged in unlawful activity. See Pet. Br. 11-12. Finally, our conclusion that *Edmond* does not govern informational checkpoints follows from the settled principle that law enforcement officials attempting to solve crimes may and should seek assistance from citizens. See Pet. Br. 12-13; U.S. Br. 21-22.

Respondent does not address, let alone rebut, any of these points. Rather, he simply parrots the court below in asserting that the Lombard roadblock "is nothing more than the type of ordinary crime investigation prohibited under *Edmond*." Resp. Br. 16. Likewise, respondent's *amici* contend that "the objective of identifying potential witnesses to a prior criminal offense or vehicular crime * * * is synonymous with an interest in 'the ordinary enterprise of investigating crimes.'" Brief for the National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 18 ("NACDL Br.").

Respondent and his *amici* offer no support for their assertions, which necessarily rest on the premise that *Edmond* invalidates all roadblocks whose primary purpose is somehow related to law enforcement. That premise is inconsistent with *Edmond* itself, which emphatically rejected the notion that it had adopted a "non-law-enforcement primary purpose test" for roadblocks. 531 U.S. at 44 n.1. *Edmond* recognizes that there are two categories of law-enforcement-related roadblocks: those that serve "the general interest in crime control," which are *per se* invalid, and those that serve some other law-enforcement purpose, which are not. See *id.* at 42 (distinguishing between permissible and impermissible law enforcement purposes). The Lombard informational roadblock, which sought information about a past unsolved crime committed by others, falls within the second category.

Amici further contend that *Edmond* prohibits all roadblocks except those falling within a "special needs exception."

NACDL Br. 19. This ignores the Court's recognition, both before and after *Edmond*, that the Fourth Amendment "special needs" doctrine does not apply to checkpoints. See *Ferguson v. City of Charleston*, 532 U.S. 67, 83 n.21 (2001) ("the Court explicitly distinguished the cases dealing with checkpoints from those dealing with 'special needs'"); *Sitz*, 496 U.S. at 450 (rejecting contention that "there must be a showing of some special governmental need 'beyond the normal need' for criminal law enforcement before a balancing analysis is appropriate"). Indeed, the "special needs" doctrine is essentially a "non-law-enforcement purpose" test. See *Ferguson*, 532 U.S. at 79 (a "special need" is "one divorced from the State's general interest in law enforcement"). Thus, in rejecting a "non-law-enforcement primary purpose test" for roadblock cases, 531 U.S. at 44 n.1, *Edmond* necessarily rejected the "special needs" test as well.

Finally, respondent contends that even if *Edmond* is limited to roadblocks designed to detect unlawful activity by the motorists themselves, the Lombard checkpoint still would fail Fourth Amendment scrutiny. The reason, respondent asserts, is that "the Lombard roadblock was designed not only to find witnesses – it was equally designed to find th[e] driver" involved in the hit-and-run. Resp. Br. 16.

Respondent's factual premise — that the purpose of the Lombard checkpoint was to find the hit-and-run perpetrator — finds no support in the record. During the evidentiary hearing before the trial court, the Lombard detective testified that he was looking only for witnesses, not for the driver actually involved in the hit-and-run. J.A. 15, 18, 24. The trial court credited that testimony, expressly finding that the purpose of the roadblock was "to determine if any witnesses at that same time of night of the same day would have seen anything." J.A. 30. And the Illinois Supreme Court, while reversing the trial court's legal conclusion, accepted the trial court's factual finding

regarding the checkpoint's purpose. Pet. App. 7a-8a, 10a. Given this record, respondent may not seek affirmance on the ground that the Lombard checkpoint's primary purpose was to find the perpetrator. See *Hernandez v. New York*, 500 U.S. 352, 366 (1991) ("in the absence of exceptional circumstances, we would defer to the state-court factual findings, even when those findings relate to a constitutional issue").

In sum, because the primary purpose of the Lombard checkpoint was to find witnesses to a past but unsolved crime, it is not *per se* invalid under *Edmond*. This result is compelled not only by precedent, but also by common sense. As the Court recently confirmed, "[l]aw enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen." *United States v. Drayton*, 536 U.S. 194, 200 (2002). A roadway is a public place, and an officer oftentimes can put questions to passing motorists and hand them flyers only if they bring their vehicles to a halt. See *State v. Gerrish*, 311 Or. 506, 513, 815 P.2d 1244, 1248 (1991); U.S. Br. 12-13. Such brief stops are designed not to detect criminal activity by the motorists themselves, but simply to protect the officer's safety while he or she engages in the legitimate task of canvassing for witnesses. It follows that the Fourth Amendment does not categorically prohibit informational checkpoints.

This result fits comfortably with this Court's roadblock cases, which hold that checkpoints serving certain interests — protecting our borders, getting drunk and unlicenced drivers off the road — are not *per se* unlawful. Such roadblocks, while related to law enforcement, do not have the primary purpose of "general crime control," as *Edmond* understood the term. Precisely the same could be said of checkpoints serving the interest in obtaining information from motorists regarding a known but unsolved crime committed by others.

II. The Lombard Checkpoint Satisfies The Reasonableness Factors Applied In This Court's Checkpoint Cases.

Because *Edmond* does not govern, the Lombard checkpoint must be evaluated under the *Brown* reasonableness factors.[1] Our initial brief demonstrated that the checkpoint passes muster under those factors. Pet. Br. 14-21; see also U.S. Br. 11-17, 23-27. Respondent's arguments to the contrary (Resp. Br. 17-28) fail to persuade.

A. The checkpoint served a weighty public concern.

In response to our contention that finding witnesses to a fatal hit-and-run is a weighty public concern (Pet. Br. 14-15), respondent asserts that *Edmond* "implicitly held that the first prong of the *Brown* test could never be satisfied by reference to general crime control." Resp. Br. 18. This argument founders on two levels. First, as demonstrated above, an informational roadblock — which seeks information about a *specific* crime —

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[1] The United States (U.S. Br. 9-10), citing the following sentence from *Edmond*, suggests that *Edmond* applied the *Brown* reasonableness factors: "The constitutionality of such checkpoint programs still depends on a balancing of the competing interests at stake and the effectiveness of the program." 531 U.S. at 47. However, as the sentence preceding the cited sentence makes clear, the Court was referring only to checkpoints that did not advance the general interest in crime control. See *ibid.* ("It goes without saying that our holding today does nothing to alter the constitutional status of sobriety and border checkpoints that we approved in *Sitz* and *Martinez-Fuerte*, or of the type of traffic checkpoint that we suggested would be lawful on *Prouse*."). Thus, the *Brown* reasonableness test applies only to checkpoints that do not advance the general interest in crime control, not to the type of checkpoints declared *per se* invalid in *Edmond*. See *Edmond*, 531 U.S. at 49 (Rehnquist, C.J., dissenting) (noting that the majority in *Edmond* did not apply the *Brown* reasonableness factors).

does not serve *general* crime control purposes. See Section I, *supra*. Second, *Edmond* did not apply the *Brown* reasonableness test to checkpoints whose primary purpose was general crime control. See p. 6 n.1, *supra*.

Thus, in determining whether finding witnesses to a fatal hit-and-run is a weighty public concern, it is necessary to look past *Edmond*. On this point, respondent contends that "solving a single accident with a single victim[] is not [a concern] of such magnitude as to justify a roadblock of a major city thoroughfare." Resp. Br. 19. However, if verifying driver's licenses and vehicle registrations qualifies as a weighty public concern, which it does (see *Edmond*, 531 U.S. at 37-38), then solving a fatal hit-and-run accident must as well.

Moreover, as *amici* ably demonstrate, enabling officers to locate witnesses to unsolved crimes is crucial to law enforcement. See U.S. Br. 11-17 (noting that informational checkpoints have been used in missing children cases); Brief for the Illinois Association of Chiefs of Police et al. as *Amici Curiae* 4-9 ("IACP Br."); Brief for Ohio and 22 Other States and Territories as *Amici Curiae* 4-8 ("Ohio Br."). For some crimes, motorists will constitute the most promising pool of potential witnesses, and oftentimes the only practicable means to reach those individuals is through an informational checkpoint. See *Gerrish*, 311 Or. at 513, 815 P.2d at 1248 ("flagging down" a motorist is "analogous to tapping a citizen on the shoulder at the outset to get a citizen's attention"). It follows that informational checkpoints serve a weighty public concern, particularly where the information sought regards a crime involving a fatality.

B. The checkpoint was designed to advance the public's interest in solving the crime.

Respondent does not even attempt to rebut our contention (Pet. Br. 15-16) that the Lombard checkpoint was designed, in

both time and place, to find witnesses to the hit-and-run. Instead, respondent briefly argues that there is no "statistical support" demonstrating the effectiveness of informational checkpoints. Resp. Br. 20-21.

This argument ignores the distinction between sobriety checkpoints and informational checkpoints. A sobriety checkpoint rests on the premise that there will be a certain non-negligible percentage of impaired drivers on the road. Thus, in evaluating such checkpoints under *Brown*, it makes sense to measure their effectiveness by calculating the percentage of motorists who are found to be impaired. An informational checkpoint does not rest on the same premise. Because criminal investigations are not linear and solving crimes often depends upon a coalescence of information gathered from several different sources, it would make little sense to evaluate informational checkpoints by calculating their "yield." Rather, such checkpoints should be evaluated by determining whether they are reasonably designed, in both time and place, to find witnesses to the specific crime. Here, the record demonstrates that the Lombard checkpoint was designed to maximize the likelihood of finding witnesses to the fatal hit-and-run.

Respondent further contends that the Lombard police had "reasonable alternatives" to an informational checkpoint. Resp. Br. 26-28. However, as shown in our opening brief (Pet. Br. 15-16), courts do not second guess law enforcement's decisions regarding which tools to use to solve crimes. See *Sitz*, 496 U.S. at 453-454. Moreover, as *amici* observe, there often are no practical alternatives to informational roadblocks. See U.S. Br. 12-17; IACP Br. 7.

C. The checkpoint was minimally intrusive.

1. Our initial brief demonstrated that the Lombard checkpoint caused a minimal "objective" intrusion. Pet. Br. 16-17. Respondent does not deny that the "objective" aspect of an

intrusion is "measured by the duration of the seizure and the intensity of the investigation." *Sitz*, 496 U.S. at 452. Rather, he argues that the detention took too long and that the officer's encounter with each motorist was akin to an interrogation. Resp. Br. 22-25.

With respect to the duration of the seizure, the record below establishes that a motorist's encounter with the Lombard officer lasted ten to fifteen seconds. J.A. 24 (testimony of Detective Vasil); Pet. App. 21a (Thomas, J., dissenting). Respondent asserts that because "[d]etention is not measured by the length one is face-to-face with a police officer," but rather "by the length of time that a person's liberty is curtailed," the actual length of detention "was several minutes." Resp. Br. 22.

Respondent's argument is unpersuasive. As an initial matter, there is no record evidence to support his supposition that the Lombard checkpoint caused an actual delay of "several minutes." In any event, the duration inquiry focuses not upon the delay occasioned by the line of cars approaching the checkpoint, but only upon a motorist's face-to-face time with the officer. This is confirmed by *Sitz*, which found it appropriate to "address only the initial stop of each motorist passing through a checkpoint and the associated preliminary questioning and observation by checkpoint officers." 496 U.S. at 450-51. The fact that *Sitz* determined that "[t]he average delay for each vehicle was approximately 25 seconds" must mean that the duration inquiry excludes the time that each vehicle spends in line. *Id.* at 448. Thus, the encounters at the Lombard checkpoint are properly considered to have lasted 10-15 seconds. And even if respondent were correct that the encounters lasted "several minutes," the checkpoint still would pass muster. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 547 (1976) (approving checkpoint with a duration of "three to five minutes").

With respect to the intensity of the Lombard checkpoint, respondent contends that the officer's questioning "fall[s] squarely within the definition of 'interrogation.'" Resp. Br. 22. This contention ignores the undisputed record evidence, which establishes that the Lombard officer did not ask motorists for their names, drivers' licenses or proof of insurance, and merely handed motorists a flyer and asked if they had information regarding the hit-and-run. J.A. 15, 24-25; compare *Martinez-Fuerte*, 428 U.S. at 558 (occupants subject to visual inspection, questioning, and possible requests for documents).

The fact that the motorists themselves were not the targets of the officer's questions belies respondent's suggestion that the motorists were subject to an "interrogation." Asking citizens for information about crimes committed by others is not an interrogation; rather, it is a traditional police tool of no constitutional moment. See *Drayton*, 536 U.S. at 200 ("[l]aw enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen"); *Miranda v. Arizona*, 384 U.S. 436, 477 (1966) ("[g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process" is a "traditional function of police officers in investigating crime"). There is no indication in the record that a motorist passing through the Lombard checkpoint could not have declined to respond to the officer's questions. Accordingly, respondent's characterization of the checkpoint encounter as an "interrogation" is nothing more than baseless rhetoric.

2. Our initial brief also demonstrated that the "subjective" nature of the intrusion caused by the Lombard checkpoint was minimal. Pet. Br. 17-18. In arguing the contrary, respondent does not deny that the checkpoint itself—the presence of police and emergency vehicles, the oscillating

lights, and the officer's orange reflective vest with the word "Police" — made its official nature obvious. Nor does respondent deny that Lombard officers exercised no discretion over which vehicles would be stopped.

Instead, respondent asserts that there were no "guidelines" or "constraints" on the officers' conduct. Resp. Br. 21, 25-26. Respondent's assertion defies the record. As the Lombard detective testified and the trial court found, the decision to implement the checkpoint was made by a high ranking officer. J.A. 17, 26-27, 30. At the checkpoint itself, the officer exercised no discretion as to which vehicles to stop, but rather stopped all eastbound traffic. J.A. 18-19, 24, 30. The record does not suggest that the officer did anything but hand out flyers and ask motorists whether they had any information about the fatal hit-and-run. There is no basis whatsoever for respondent to charge (Resp. Br. 26) that the Lombard roadblock "left virtually unfettered discretion to the officers in the field." To the contrary, the officers in the field exercised little discretion and comported themselves appropriately.

D. Validating the Lombard checkpoint would not result in an unacceptable proliferation of informational checkpoints.

Finally, respondent echoes the court below in suggesting that validating the Lombard checkpoint would result in an unacceptable proliferation of informational roadblocks. Resp. Br. 28-30. This suggestion ignores the fact, confirmed by *amici* Illinois Association of Chiefs of Police and Major Cities Chiefs Association, that resource constraints place severe practical limits on the use of informational checkpoints. See IACP Br. 9-10 ("the experience of many members is to use such checkpoints only in cases where an unsolved crime involves a matter of grave public concern, such as a child abduction or a fatal hit-and-run"). *Amici* further confirm that due to concerns

of "appear[ing] intrusive to the public," they "reserve [informational roadblocks] for occasional use." *Id.* 10.

Even putting aside those practical and prudential limits, respondent also ignores the legal limits imposed by the *Brown* reasonableness factors. Courts applying and enforcing those factors will be fully capable of ensuring — as with the sobriety, immigration and license checkpoints already subject to the *Brown* test — that informational checkpoints are not employed unreasonably.

III. *Sitz* Should Not Be Overruled.

Because the Lombard checkpoint (a) is not *per se* invalid under *Edmond* and (b) passes muster under the *Brown* reasonableness factors, the checkpoint comports with prevailing precedent. Implicitly recognizing this, respondent urges this Court to alter its Fourth Amendment jurisprudence by overruling *Sitz*. Resp. Br. 6-13, 28-31. Respondent has *amicus* support on this point. See Brief of National College for DUI Defense as *Amicus Curiae* ("DUI College Br.").

This Court should decline to reconsider *Sitz*. Even if *Sitz* were arguably incorrect, there would be no special justification to justify its overruling. In any event, respondent and his *amicus* fail to establish that *Sitz* was incorrectly decided.

A. Even if *Sitz* were open to question, there would be no special justification to warrant its overruling.

The doctrine of *stare decisis*, while not "an 'inexorable command,'" is "'of fundamental importance to the rule of law.'" *Harris v. United States*, 536 U.S. 545, 556-557 (2002) (internal citations omitted). "Even in constitutional cases, in which *stare decisis* concerns are less pronounced, [this Court] will not overrule a precedent absent a 'special justification.'" *Id.* at 557 (internal citation omitted). Respondent and his *amicus*, while contending that *Sitz* was wrongly decided, do not

demonstrate that *Sitz* presents any the special justifications that have been held to warrant a departure from *stare decisis*.

Sitz has not proven to be "unworkable in practice." *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 783 (1992); see also *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989). Respondent and his *amicus* adduce no evidence, and we are aware of none, that state or federal courts have found it difficult to apply *Sitz* to sobriety checkpoints — or, for that matter, to apply the *Brown* reasonableness factors to checkpoints in general.

Nor has *Sitz* had its "doctrinal underpinnings" undermined by subsequent decisions. *Dickerson v. United States*, 530 U.S. 428, 443 (2000). To the contrary, this Court's post-*Sitz* decisions have, without exception, cited *Sitz* approvingly and reaffirmed its place in this Court's Fourth Amendment jurisprudence. See, *e.g.*, *Ferguson*, 532 U.S. at 83 n.21; *Illinois v. McArthur*, 531 U.S. 326, 330 (2001); *Edmond*, 531 U.S. at 37-39, 42-44, 47 & n.2; *Chandler v. Miller*, 520 U.S. 305, 308 (1997); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995). Thus, it cannot be said that *Sitz* has had its foundation undermined by subsequent decisions. Cf. *Ring v. Arizona* 536 U.S. 584, 609 (2002) (overruling *Walton v. Arizona*, 497 U.S. 639 (1990), as "irreconcilable" with *Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

Finally, *Sitz* is not a case where the "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 855 (1992). In its lengthy attempt to demonstrate that *Sitz* misapplied the *Brown* reasonableness factors, respondent's *amicus* does not establish that any of the factual predicates underlying *Sitz* have been proven wrong in the past thirteen years. See DUI College Br. 13-30. Indeed, with one exception,

amicus claims not that any of the facts presented in *Sitz* has changed, but rather that the Court misunderstood the constitutional significance of those facts.[2] That is not sufficient to justify departing from *stare decisis*. Cf. *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (overruling *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), because its economic foundations were proven incorrect).

While respondent and his *amicus* do not establish that *Sitz* presents any special justification to warrant its overruling, there is a strong countervailing reason not to do so. As *amicus* inadvertently demonstrates, DUI College Br. 20-21, sobriety checkpoints have "become embedded in routine police practice." *Dickerson*, 530 U.S. at 443. Accordingly, overruling *Sitz* would cause hardship to the many State and local governments that have incorporated sobriety checkpoints into their law enforcement strategies over the past thirteen years.

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[2] The one exception concerns the effectiveness of sobriety checkpoints. According to *amicus*, experience has proven that there is no nexus between sobriety checkpoints and highway safety because eight of the nine states with the highest rate of alcohol-related deaths allow checkpoints, while eight of the nine states with the lowest rate of alcohol-related deaths also allow checkpoints. See DUI College Br. 20. Those statistics are meaningless, for they do not reveal the extent to which the States that *allow* sobriety checkpoints actually *use* them, or whether eliminating checkpoints would have increased the alcohol-related death rate in each of those States. *Amicus* further asserts that between 1992 and 2001, "60% of the states that do not employ roadblocks experienced a reduction in alcohol related traffic fatalities," while 62.5% of the "states using roadblocks . . . experienced an increase in alcohol-related fatalities." *Id.* 20-21 (emphasis in original). But, again, those statistics do not speak to the relevant question of whether the rate of alcohol-related fatalities would have been higher without checkpoints (in the States that use them) or lower with checkpoints (in the States that do not use them).

See *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 203 (1991) (declining to overrule case where doing so "would require [certain] States to reexamine their statutes" governing workers' compensation); *Lawrence v. Texas*, 123 S. Ct. 2472, 2490-2491 (2003) (Scalia, J., dissenting).

For these reasons, even if *Sitz* were of questionable validity, it still would not be an appropriate subject for reconsideration.

B. *Sitz* was correctly decided.

As it happens, *Sitz* was correctly decided. In arguing the contrary, respondent and his *amicus* contend that the Framers of the Fourth Amendment would have disapproved of sobriety checkpoints. See Resp. Br. 8-13; DUI College Br. 4-13; see also NACDL Br. 4-7. Specifically, respondent and his *amicus* assert that checkpoints are the modern-day equivalent of general warrants and writs of assistance — the abusive practices of the Crown that led the Framers to adopt the Fourth Amendment and, before that, the American Colonies to Revolution. See generally *Marcus v. Search Warrants*, 367 U.S. 717, 724-733 (1961); *Boyd v. United States*, 116 U.S. 616, 622-631 (1886); Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 945-947 (1997).

Respondent's charge is beyond hyperbole. As this Court has recognized, general warrants were highly intrusive devices that "authoriz[ed] either the arrest of all persons connected with the publication of a particular libel and the search of their premises, or the seizure of all the papers of a named person alleged to be connected with the publication of a libel." *Marcus*, 367 U.S. at 727; see also *Stanford v. Texas*, 379 U.S. 476, 482-483 (1965) (same).

A writ of assistance was an "even broader form of general warrant." *Marcus*, 367 U.S. at 728 n.22. While general warrants "were at least concerned with a particular designated

libel," writs of assistance "empowered the executing officer to seize any illegally imported goods or merchandise." *Ibid.* Moreover,

> in addition to authorizing search without limit of place, they had no fixed duration. In effect, complete discretion was given to the executing officials; in the words of James Otis, their use placed 'the liberty of every man in the hands of every petty officer.'

Ibid. (quoting Tudor, LIFE OF JAMES OTIS 66 (1823)); see also *Stanford*, 379 U.S. at 481 ("The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws."); *Frank v. Maryland*, 359 U.S. 360, 363 (1959) ("ransacking by Crown officers of the homes of citizens in search of evidence of crime or of illegally imported goods"). Making matters worse, writs of assistance "commanded 'all officers and subjects of the Crown to assist in their execution,' and * * * were not returnable after execution, but rather served as continuous authority during the lifetime of the reigning sovereign." *United States v. New York Tel. Co.*, 434 U.S. 159, 180 n.3 (1977) (Stevens, J., dissenting) (quoting Lasson, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 53-54 (1937)).

The sobriety checkpoints validated in *Sitz* bear no resemblance to general warrants or writs of assistance. Unlike both instruments, a checkpoint is fixed in place and time, and does not allow the officer any discretion to pick and choose which motorists will be stopped. Cf. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (invalidating roving patrols, which gave unbridled discretion to officers in the field); *Delaware v. Prouse*, 440 U.S. 648 (1979) (same); *Wilkes v. Wood*, 19 How. St. Tr. 1153, 1167, 98 Eng. Rep. 489 (C.P. 1763) ("a discretionary power given to [officers] to search wherever their

suspicions may chance to fall . . . is totally subversive to the liberty of the subject"). And unlike a writ of assistance, a sobriety checkpoint obviously does not conscript citizens to assist in searching the homes of others.

Moreover, a sobriety checkpoint involves only the brief seizure of a vehicle, not the search (let alone the ransacking) of a home. The distinction between homes and vehicles was of crucial importance to the Framers. The Fourth Amendment was "undeniably designed to embody" the lessons of *Entick v. Carrington*, 19 How. St. Tr. 1029 (C.P. 1765), and *Wilkes v. Wood*, *supra*, in which Lord Camden condemned general warrants. Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 767 (1994); see also *Stanford*, 379 U.S. at 482-485; *Marcus*, 367 U.S. at 728; Maclin, *supra*, at 954-955. Significantly, "colonial press accounts of [those cases] stressed the violation of the house in the searches made under general warrants, and the 'papers' involved in those cases were the kind generally kept in the house." Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 602 (1999).

Given this historical backdrop, "the dwelling house was not only the focus but a frontier of the framers' concern with privacy, for they accorded places of business lesser protection from promiscuous search and seizure, and ships, in the Collection Act [of 1789], almost none." Cuddihy, THE FOURTH AMENDMENT: ORIGINS AND MEANING 1556 (1990); see also Davies, *supra*, at 601 ("the actual complaints and concerns about search and seizure expressed during the historical controversies that preceded the Revolution were focused on searches of houses under general warrants"). As one scholar noted, "no late eighteenth-century lawyer would have imagined that ships were entitled to the same common law protection due 'houses, papers, and effects.'" *Id.* at 605.

It therefore comes as no surprise that section 15 of the Collection Act of 1789 — enacted by the First Congress almost simultaneously with its adoption of the Fourth Amendment — permitted the suspicionless search of ships entering port. See Collection Act of 1789, ch. 5, § 15, 1 Stat. 29, 40 ("it shall and may be lawful for the collector, naval officer and surveyor, of any port of entry or delivery, at which any ship or vessel may arrive, to put on board such ship or vessel one or more inspectors, who shall make known to the person having charge of such ship or vessel, the duties he is to perform by virtue of this act").[3] Because the Congress that adopted the Fourth Amendment also permitted the suspicionless *search* of ships, it cannot be said that the Framers would have categorically disapproved of suspicionless *seizures* at vehicle checkpoints. This Court's Fourth Amendment jurisprudence, which affords far greater protection to homes than vehicles, reflects this

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[3] Respondent ignores section 15 in arguing that "a portion" of the Act "provided that a warrantless search of ships could occur only if customs officials had reasonable suspicion that taxable property was concealed." Resp. Br. 12. It is true that section 24 of the Act, the provision to which respondent alludes, allowed for the warrantless search of ships if the officer had "reason to suspect any goods, wares of merchandise subject to duty shall be concealed." Collection Act of 1789, ch. 5, § 24, 1 Stat. 29, 43. It also is true that this Court has cited section 24 in approving warrantless searches of vehicles where officers had probable cause to believe that the vehicle contained contraband. See *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999); *Carroll v. United States*, 267 U.S. 132, 150-153 (1925). However, the searches authorized by section 24 and approved in *Houghton* and *Carroll* — like the checkpoint in *Edmond* — were designed to detect unlawful conduct taking place on the ships or in the vehicles. By contrast, section 15 allowed suspicionless searches merely upon a ship's entry into port, showing that the Framers did not believe individualized suspicion to be categorically required in all instances where vehicles are seized.

understanding. See *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976) ("This Court has traditionally drawn a distinction between automobiles and homes or offices in relation to the Fourth Amendment."); *Martinez-Fuerte*, 428 U.S. at 561 ("one's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence").

In sum, for respondent and his *amicus* to liken a sobriety checkpoint to a general warrant and writ of assistance is to trivialize the abuses that prompted the Revolution and animated the Fourth Amendment. An informational checkpoint bears even less resemblance to general warrants and writs of assistance. After all, unlike sobriety checkpoints (and unlike general warrants), informational checkpoints are not designed to uncover unlawful activity by those subjected to the checkpoint. Rather, motorists at informational checkpoints are only asked (not compelled) to provide information regarding a prior crime committed by somebody else.

Finally, it bears mention that motorists passing through an informational checkpoint simply (i) slow or stop their vehicles and move in line toward the officer and (ii) if they agree, receive a flyer and/or other request for information from the officer. The first component imposes no greater restriction than an ordinary traffic light, stop sign, toll booth, accident detour, or lane closure. See *Maryland v. Wilson*, 519 U.S. 408, 420 (1997) (Stevens, J., dissenting) ("the passengers had not yet been seized at the time the car was pulled over, any more than a traffic jam caused by construction or other state-imposed delay not directed at a particular individual constitutes a seizure of that person"). And the second component, a simple request for information, is a "traditional function of police officers in investigating crimes." See *Miranda*, 384 U.S. at 477. By its nature and purpose, an informational checkpoint is incomparable to a general warrant or writ of assistance.

Accordingly, *Sitz* is not inconsistent with the Framers' understanding of the Fourth Amendment. Respondent and his *amicus* provide no evidence conclusively showing that the Framers were concerned with minor intrusions of the type caused by sobriety checkpoints; in fact, the available historical evidence suggests the contrary. And, more to the point, there is no evidence whatsoever demonstrating that the Framers would have frowned upon the even lesser intrusion caused by informational checkpoints.

* * *

In the absence of "conclusive[]" historical evidence, the proper course under the Fourth Amendment is to "strike a current balance between individual and societal interests by subjecting particular contemporary circumstances to traditional standards of reasonableness." *Atwater v. City of Lago Vista*, 532 U.S. 318, 346 (2001) (citing *Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999)). That inquiry, as demonstrated above and in our initial brief, results in the conclusion that the Lombard informational checkpoint comports with the Fourth Amendment.

CONCLUSION

The judgment of the Supreme Court of Illinois should be reversed.

Respectfully submitted.

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